HON'BLE SHRI G.S.SINGHVI, THE CHIEF JUSTICE
AND
HON'BLE SHRI JUSTICE C.V.NAGARJUNA REDDY

WRIT PETITION No. 16016 of 2007

Between:

M/s. Fine Industries

… Petitioner

AND

Customs, Excise and Service Tax Appellate Tribunal
FKCCI – WTC Building,
K.G. Road, Bangalore and another.

… Respondents

: ORDER :

Counsel for the petitioner : Shri K. Vijay Kumar

Counsel for the respondents : Shri A. Rajashekar Reddy

Dated: 30th July, 2007

Per G.S. SINGHVI, CJ.

Feeling dissatisfied with the substantial relief granted by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench at Bangalore (for short, 'the Tribunal') under Section 35F of the Central Excise Act, 1944 (for short, 'the Act'), the petitioner has filed this petition under Article 226 of the Constitution of India.

The petitioner is engaged in the manufacture of threaded roof bolts from CTD bars, which are supplied to Singareni Collieries Company Limited, Kothagudem. By an order dated 29-3-2006 passed under Section 11A of the Act, Additional Commissioner of Central Excise, Hyderabad-III, Commissionerate (for short, 'the Additional Commissioner') created a demand of Rs.35,55,127/- against the petitioner and also imposed penalty of an equivalent amount by invoking Section 11AC and further penalty of Rs.10,00,000/- under Rule 25 of the Central Excise Rules, 2002 on the ground that it had manufactured and cleared goods during the period from 1-9-2003 to 31-3-2004 without paying duty. The appeal preferred by the petitioner was dismissed by the Commissioner of Customs and Central Excise (Appeals – III), Hyderabad, vide his order dated 30th November, 2006.

The petitioner challenged the appellate order before the Tribunal. It also filed an application under Section 35F of the Act for waiver of pre-deposit of duty and penalty and for stay of the appellate order. The Tribunal referred to the judgment of its Larger Bench in **Mahindra & Mahindra Ltd. v. CCE**[1] and observed that the activity of cutting, threading, tapering and hot forging of CTD bars brings into existence a new article, which can be cleared only after paying the prescribed duty. Accordingly, it directed the petitioner to deposit a sum of Rs.3,00,000/- within three months and declared that the balance

duty and penalty shall stand waived and recovery stayed. The relevant portion of the Tribunal's order is extracted below:

> "We have perused the larger bench judgment cited above. Prima facie the cited judgment cannot be distinguished. The prayer of the appellants to grant various benefits has not considered by the Lower Authority which prima facie appears to be incorrect. Therefore, the appellants should pre-deposit a sum of Rs. 3 lakhs within a period of three months. On such deposit, the balance of duty and penalty stands waived and recovery stayed. Call on to report compliance on 24.8.07. On compliance, there shall be no recovery. Failure to comply will entail dismissal of the appeal."

Sri K. Vijay Kumar, learned counsel for the petitioner invited the Court's attention to order dated 7-8-2006 passed by the Tribunal in Appeal No.Excise/351/2006 - The Commissioner of Central Excise and Customs, Guntur v. The Andhra Pradesh Heavy Machinery and Engineering Limited to show that on an earlier occasion, the Tribunal had rejected the revenue's plea on the issue of levy of duty on "W Straps" and "Roof Bolts", and argued that the Tribunal is not at all justified in taking opposite view in the petitioner's case. Learned counsel emphasised that the petitioner and M/s. Andhra Pradesh Heavy Machinery and Engineering Limited are engaged in the manufacture of identical goods, which are supplied to the common consumer namely, Singareni Collieries Company Limited, and argued that if the items manufactured by the latter are not excisable, threaded roof bolts manufactured by the petitioner by cutting, threading, tapering and hot forging of CTD bars cannot be subjected to duty and the Tribunal committed a serious error by recording a prima facie finding against the petitioner. Learned counsel argued that the demand created by the assessing authority is liable to be stayed in its totality because the orders passed by the Tribunal are contradictory. In support of this argument, Sri K. Vijay Kumar relied on the judgment of the Supreme Court in **Damodar J. Malpani v. Collector of Central Excise**[2] and of the Calcutta High Court in **Opal Exports Pvt. Ltd. v.**

Collector of Customs[3] and **Shree Krishna Engineering Industries v. Commissioner of Central Excise, Calcutta-I**[4].

Sri A. Rajashekar Reddy, learned Assistant Solicitor General argued that the discretion exercised by the Tribunal not to accept the petitioner's prayer for stay of the demand created by the assessing authority in its entirety does not suffer from any jurisdictional infirmity or error of law warranting interference by this Court under Article 226 of the Constitution. Sri Reddy emphasised that while examining the petitioner's prayer for waiver of pre-deposit, the Tribunal was bound to consider the tenability of it's claim and this is precisely what has been done in the present case. He submitted that the judgment of the Full Bench in **Mahindra & Mahindra Ltd. v. CCE** (supra) is binding on the smaller Benches of the Tribunal and no illegibility was committed by the Tribunal by recording a prima facie finding that threaded roof bolts manufactured by the petitioner from CTD bars are excisable. Sri Rajashekar Reddy pointed out that in the case of M/s. Andhra Pradesh Heavy Machinery and Engineering Limited, the Commissioner (Appeals) dropped the demand created by the Assistant Commissioner on the ground that revenue had not produced any evidence to show that the goods manufactured by the assessee constituted an excisable commodity, and argued that the order passed in that case cannot be treated as a precedent for ignoring the well-reasoned orders passed by the assessing and appellate authorities in the petitioner's case. Learned counsel then submitted that the direction given by the Tribunal to the petitioner to deposit Rs.3,00,000/- as against the demand of Rs.80,00,000/- is substantially just and does not call for interference by this Court because the petitioner did not adduce any evidence before the Tribunal to show that the condition of pre-deposit will cause undue hardship.

We have considered the respective submissions. Section 35F of the Act, which has bearing on the decision of this petition, reads as

under:

> **"35F Deposit, pending appeal, of duty demanded or penalty levied.-** Where in any appeal under this Chapter, the decision or order appealed against relates to any duty demanded in respect of goods which are not under the control of Central Excise authorities or any penalty levied under this Act, the person desirous of appealing against such decision or order shall, pending the appeal, deposit with the adjudicating authority the duty demanded or the penalty levied :
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> Provided that where in any particular case, the Commissioner (Appeals) or the Appellate Tribunal is of opinion that the deposit of duty demanded or penalty levied would cause undue hardship to such person, the Commissioner (Appeals) or, as the case may be, the Appellate Tribunal, may dispense with such deposit subject to such conditions as he or it may deem fit to impose so as to safeguard the interests of revenue.
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> Provided further that where an application is filed before the Commissioner (Appeals) for dispensing with the deposit of duty demanded or penalty levied under the first proviso, the Commissioner (Appeals) shall, where it is possible to do so, decide such application within thirty days from the date of its filing."

An analysis of the above reproduced provision makes it clear that the person desirous of appealing against the demand created under the Act and the Rules or penalties levied by the competent authority has to deposit the entire amount of duty and/or penalty. However, the appellate authority and the Tribunal are vested with the power to dispense with the requirement of deposit if it is of the opinion that the deposit of duty demanded or penalty levied would cause undue hardship to the appellant.

In the present case, the Tribunal has, after adverting to the manufacturing process adopted by the petitioner and relying on the judgment of the Full Bench in **Mahindra & Mahindra Ltd. v. CCE** (supra), expressed prima facie opinion that the goods manufactured by the petitioner are liable to duty. In the case of M/s. Andhra Pradesh Heavy Machinery and Engineering Limited, the revenue did not adduce any evidence to show that the goods manufactured by the assessee were excisable. Therefore, the view taken in that case

cannot be treated as a binding precedent for other cases. In any case, the Tribunal did not commit any error by relying on the verdict of the Full Bench for the purpose of holding that the threaded bolts manufactured by the petitioner are excisable goods. Therefore, we do not see any reason to interfere with the order under challenge.

The only other factor which is required to be satisfied in a case like the present one is whether the requirement of pre-deposit would cause undue hardship to the petitioner. Although the impugned order does not contain detailed reasons on this issue, from the material placed before this Court, we are convinced that the petitioner has failed to show that compliance of the requirement of pre-deposit would cause undue hardship to it. In the application filed by it under Section 35F of the Act, the petitioner raised a bald plea of acute financial hardship, but did not adduce any evidence to substantiate the same. Before this Court also, no evidence like the audited balance sheet and returns have been produced to prove that pre-deposit of the duty and penalty will cause undue hardship to the petitioner. As a matter of fact, the Tribunal has been more than considerate to the petitioner because it ordered waiver of the pre-deposit of the duty and penalty amounting to Rs.80,00,000/- subject to the condition of deposit of a sum of Rs.3,00,000/- only. Therefore, we are inclined to agree with the learned Assistant Solicitor General that substantial justice has been done to the petitioner.

The judgments on which reliance has been placed by the learned counsel for the petitioner do not have any bearing on the facts of this case and, therefore, we do not consider it necessary to deal with them.

In the result, the writ petition is dismissed.

As a sequel to dismissal of the writ petition, WPMP.No.20350 of 2007 filed by the petitioner for interim relief is also dismissed.

G.S. SINGHVI, CJ.

30th July, 2007

C.V. NAGARJUNA REDDY, J.

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[1] 2005 (190) ELT 301

[2] 2002 (146) ELT 483 (SC)

[3] 1992 (60) ELT 232 (Cal.)

[4] 2000 (122) ELT 682 (Cal.)